SETTLEMENT AGREEMENT AND RELEASE

This Settlement Agreement and Release ("Agreement") is entered into between Audra Carter ("Carter") and the City of Clovis ("City") (collectively the "Parties"), with respect to the following Recitals, which are a substantive part of this Agreement:

RECITALS

A. City employed Carter beginning in 2007, and she became a probationary police officer in or about August 2008. Carter was released on probation on or about November 2, 2010.

B. On November 14, 2011, Carter filed a lawsuit against the City, Captain Matthew Basgall and Sergeant Jim Koch, entitled *Carter v. City of Clovis et al.*, Fresno County Superior Court Case No. 11 CE CG 03941 ("Lawsuit"), alleging Causes of Action for Sexual Harassment (Quid Pro Quo), Hostile Work Environment (Sexual Harassment), Retaliation, Wrongful Termination in Violation of Public Policy, Intentional Infliction of Emotional Distress, Race Discrimination by Association, and Failure to Prevent Discrimination.

C. On June 10, 2013, the Court granted the City's Motion for Summary Adjudication of Issues, resulting in the dismissal of the Causes of Action for Sexual Harassment (Quid Pro Quo), Hostile Work Environment (Sexual Harassment), Wrongful Termination in Violation of Public Policy, and Intentional Infliction of Emotional Distress. The Court's ruling also resulted in the dismissal of individuals Matthew Basgall and Jim Koch as named defendants in the Lawsuit.

D. On July 9, 2013, a Mandatory Settlement Conference was held before Court-appointed hearing officer Shelley Bryant and a settlement was reached by and between the Parties.

E. City and Carter desire to compromise and settle all actual and potential issues and/or claims arising from the Lawsuit, or otherwise connected with Carter's employment with City and her release from probation therefrom.

NOW, THEREFORE, in consideration of the mutual promises set forth herein, the Parties agree as follows:

1. Cash Payment.

a. Payment to Carter and her Counsel. City shall pay a grand total of Fifty Thousand Dollars ($50,000) payable to "Audra Carter and her attorney of record, Charles K. Manock of Manock Law." This payment constitutes settlement of a disputed claim, and is not to be considered salary, wages or punitive damages. The City shall issue a Form 1099 on said payment.

b. Timing of Payment. Payments shall be made within fifteen (15) days after this Agreement is signed by all parties, and the check will be delivered to Charles K. Manock at Manock Law, 448 W. Shaw Ave., Fresno, CA 93704.

c. Tax Liability. Notwithstanding any other provision of this Agreement, the City shall not be liable for any state or federal tax or retirement consequences Carter may have as a result of this Agreement or payment herein. City has made no representation, express or implied, regarding the tax or retirement consequences of this Agreement. Carter shall assume sole liability for all tax and retirement consequences of this Agreement. Carter shall indemnify, defend and hold harmless City from all tax and retirement consequences of this Agreement.

2. No Admission of Liability; Exclusion of Agreement in Other Proceedings. This Agreement is entered into by the Parties for the purpose of compromising and settling this disputed matter. It does not constitute, nor shall it be construed as, an admission of liability by any Party for any purpose. This Agreement or any terms, conditions or statements made herein can not be used in any other action or proceeding.

3. Dismissal of Lawsuit: Upon the execution of this Agreement and the payment of settlement proceeds, Carter, by and through her counsel of record, shall promptly provide to the District's attorney, Mark K. Kitabayashi of Lozano Smith, an executed Request for Dismissal **with prejudice** of the entire action in a form suitable for filing with the Court, with each party to bear their own costs and attorney's fees.

4. Release. Carter, individually, and on behalf of her successors, beneficiaries, trustees, creditors and assigns, completely releases, acquits, and forever discharges City, the Police Department, their agents, officers, employees, attorneys, successors, predecessors, insurers, and members of the City Council, from any and all claims, rights, demands, obligations, liabilities, claims and causes of action of any and every kind, nature and character, whether known or unknown, whether in law or in equity, which she has, may have had, or ever had, or could in the future have against City or the Police Department for any act or omission that occurred prior to entering this Agreement, and which are in any way related to the employment relationship between City and Carter, including but not limited to, the Lawsuit.

This release covers all statutory, common law, constitutional, and other claims, including, but not limited to, all wrongful or constructive discharge claims; all claims of discrimination, harassment and retaliation; all claims relating to any wages or overtime; all claims relating to contracts of employment, express or implied; any claim for attorneys' fees, costs or expenses, or interest on any sums allegedly due; any government claim of any nature; any claims, including administrative claims, under federal, state, county or municipal statute or ordinance; any claims under the Police Officer Bill of Rights, the California Government Code, the California Labor Code, the California Code of Regulations, the California Fair Employment and Housing Act, Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, the Family Medical Leave Act, the Age Discrimination in Employment Act, as amended, the Older Workers

Benefit Protection Act; 42 U.S.C. Section 1981 (discrimination), 29 U.S.C. Section 206(d)(i) (equal pay); and any other claims or complaints.

This Agreement and release is made notwithstanding section 1542 of the California Civil Code which provides:

> ***A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his or her settlement with the debtor.***

Carter expressly acknowledges that this release is intended to include its effect without limitation, all claims and causes of action that Carter does not know or suspect to exist in her favor and that this release contemplates the extinguishment of all such claims and causes of action for any acts, omissions or events which occurred prior to the effective date of her release from probation.

5. Non-Disparagement/Neutral Reference/Sealing Personnel File. The Parties agree not to disparage the other Party in connection with the employment relationship of City and Carter, including the disparagement of City's agents, officers, employees, attorneys, successors, predecessors, insurers, and members of its City Council. The Parties agree that this paragraph does not apply to legal reporting requirements of the City or Police Department. The City agrees to provide a neutral reference upon request, to include verification of employment, position, and inclusive dates of employment, except as required by court order, law or formal background check authorized by Carter.

Internal Affairs Investigations and Discipline. Any and all Internal Affairs Investigations and/or disciplinary matters will be sealed in Carter's personnel file and will not be opened unless: 1) a background investigation is conducted by any local, state or federal law enforcement agency, and a release is signed by Carter authorizing the disclosure of all "internal affairs" and/or disciplinary records to another governmental agency; 2) upon issuance of a lawful court order mandating disclosure; or 3) as necessary to defend City in any litigation.

6. Confidentiality. This Agreement and its terms are, shall be and shall remain confidential to the extent permitted by law and shall not be disclosed by any Party to any third parties except as may be required by court order, lawful subpoena, or law (i.e., California Public Records Act or Freedom of Information Act), or as may be necessary to secure court orders for the enforcement or interpretation of this Agreement.

7. Attorneys' Fees and Costs. Each of the Parties to this Agreement shall bear its own costs, expenses and attorneys' fees occurred in connection with the Lawsuit, and including the drafting of this Agreement. However, should any Party violate the terms of this Agreement and/or any Party be required to enforce the terms of this Agreement, then the prevailing party shall be entitled to reasonable attorneys' fees and costs.

8. Severability. If any provision of this Agreement is held to be void, voidable or unenforceable, the remaining portions of the Agreement shall remain in full force and effect.

9. Amendments. Any modification of this Agreement must be in writing and signed by the Parties. No oral modifications shall be effective to vary or alter the terms of this Agreement.

10. Execution in Counterparts. This Agreement may be executed in counterparts such that the signatures may appear on separate signature pages. A copy, or an original, with all signatures appended together shall be deemed a fully executed Agreement. Signatures transmitted by facsimile shall be deemed original signatures.

11. Governing Law and Interpretation. This Agreement shall be governed by and construed in accordance with the laws of the State of California. The language of all parts of this Agreement shall, in all cases, be construed as a whole, according to its fair meaning, and not strictly for or against either party.

12. Entire Agreement. This Agreement constitutes the entire agreement and understanding between the Parties. There are no oral understandings, terms, or conditions, and neither Party has relied upon any representation, express or implied, not contained in this Agreement.

13. Binding Effect. This Agreement is for the benefit of and shall be binding on all Parties and their respective successors.

14. Other Documents. All Parties agree to cooperate fully in the execution of any additional documents that may be necessary to finalize or give further force and effect to this Agreement.

15. Authority and Execution. The Parties represent and warrant that each has the full right, power, legal capacity and authority to enter into and perform their obligations under this Agreement and that no other approvals or consents of any other persons are necessary to make this Agreement enforceable. City agrees to execute this Agreement within five (5) days after Carter's executes this Agreement.

16. Voluntary Agreement. Carter understands and agrees that in entering into this Agreement she is doing so voluntarily, without any duress or undue influence on the part or behalf of City or any third party, with the full intent of releasing all of her claims against City. Carter acknowledges that: (a) she has read this Agreement; (b) she has been represented in the preparation, negotiation, and execution of this Agreement by legal counsel of her own choice or has elected not to retain legal counsel; (c) she understands the terms and consequences of this Agreement and of the releases it contains; and (d) she is fully aware of the legal and binding effect of this Agreement.

IT IS SO AGREED.

Dated: July 11, 2013

AUDRA CARTER

Plaintiff Audra Carter

Dated: July 12, 2013

CITY OF CLOVIS

Robert Woolley, City Manager
CITY OF CLOVIS

APPROVED AS TO FORM AND CONTENT:

Dated: July 11, 2013

MANOCK LAW

Charles K. Manock, Attorney for
Plaintiff Audra Carter

Dated: July 12, 2013

LOZANO SMITH

Mark K. Kitabayashi, Attorney for
Defendant CITY OF CLOVIS

SUPERIOR COURT OF CALIFORNIA • COUNTY OF FRESNO Civil Department, Central Division	Entered by:
TITLE OF CASE: **Carter v. City of Clovis**	
LAW AND MOTION MINUTE ORDER	Case Number: **11CECG03941**

Hearing Date: **June 10, 2013** Hearing Type: **From Chambers**
Department: **503** Judge/Temporary Judge: **Mark. W. Snauffer**
Court Clerk: **B. Danielson** Reporter/Tape: **Not Reported**

Appearing Parties:

Plaintiff:	Defendant:
Counsel: **no appearance**	Counsel: **no appearance**

☐ Off Calendar

☐ Continued to at Dept. for

☐ Submitted on Ps/As without argument.

☐ Judgment is affirmed ☐ with prejudice

☐ Demurrer overruled with days to answer.

☐ Tentative ruling becomes the order of the court. No further order is necessary.

☐ Pursuant to CRC 391(a) and CCP section 1019.5(a), no further order is necessary. The minute order adopting the tentative ruling serves as the order of the court.

☐ Service by the clerk will constitute notice of the order.

☐ Time for amendment of the complaint runs from the date the clerk serves the minute order.

☐ Judgment debtor sworn and examined.

☐ Judgment debtor failed to appear. Bench warrant issued in the amount of .

Judgment:

☐ Money damages entered in the amount of:
Principal Attorney fees Costs Interest Total $ **00.00**

☐ Claim of exemption is granted. Court orders withholdings modified to per pay period.

Further, court orders:

☐ Monies held by levying officer to be released to judgment creditor.

☐ to be released to judgment creditor and balance returned to judgment debtor.

☐ Levying Officer, County of notified.

☐ Notice to be filed within 15 days.

☐ Writ to issue

☐ Restitution of premises

☒ **The matter having been under advisement, the Court rules as follows: See attached Order After Hearing.**

ORDER AFTER HEARING

Re: ***Carter v. City of Clovis***
Case No. 11 CE CG 03941

Hearing Date: June 5th, 2013 (Dept. 503)

Motion: Defendants' Motion for Summary Judgment, or in the Alternative, Summary Adjudication of Issues

Ruling:

To grant the motion for summary adjudication as to the first, second, fourth, and fifth causes of action. To deny the motion for summary adjudication as to the third, sixth, and seventh causes of action. (Code Civ. Proc. § 437c.)

Explanation:

First Cause of Action - Sexual Harassment (Quid Pro Quo): "California case law recognizes two theories upon which sexual harassment may be alleged. The first is quid pro quo harassment, where a term of employment is conditioned upon submission to unwelcome sexual advances. The second is hostile work environment, where the harassment is sufficiently pervasive so as to alter the conditions of employment and create an abusive work environment. [Citation.]" (*Mogilefsky v. Superior Court* (1993) 20 Cal.App.4th 1409, 1414.)

"A cause of action for quid pro quo harassment involves the behavior most commonly regarded as sexual harassment, including, e.g., sexual propositions, unwarranted graphic discussion of sexual acts, and commentary on the employee's body and the sexual uses to which it could be put. [Citation.] To state a cause of action on this theory, is it sufficient to allege that a term of employment was expressly or impliedly conditioned upon acceptance of a supervisor's unwelcome sexual advances." (*Ibid.*)

"In quid pro quo cases, we may reach our conclusion by either of two means. We can apply an objective standard, under which we determine whether a reasonable person in the accuser's position would have believed that he or she was the subject of quid pro quo sexual harassment... In the alternative, we can apply a subjective standard, under which the fact-finder may inquire into whether the alleged harasser actually intended to subject the accuser to quid pro quo sexual harassment." (*Nichols v. Frank* (9th Cir. 1994) 42 F.3d 503, 511-12, abrogated on other grounds as stated in *Burrell v. Star Nursery, Inc.* (9th Cir. 1999) 170 F.3d 951.)

"Harassment in cases of implicit conditioning can be inferred only from the particular facts and circumstances of the case. We must examine each such charge with the utmost care, for an error either way can result in a gross injustice and will often have a disastrous impact on the life of whichever person is truly the injured party." (*Id*. at 512.)

"In attempting to determine whether implicit quid pro quo harassment has occurred, the key is often the verbal nexus. That is one way of establishing a violation. The tighter the nexus between a discussion about job benefits and a request for sexual favors, the more likely that there has been an 'implicit' conditioning by the harasser. However, each case differs, and no rule or set of rules will provide an answer in all circumstances." (*Id*. at 512-13.)

For example, in *Nichols*, the Ninth Circuit had no trouble finding a nexus between the supervisor's requests for sex and job benefits, since the supervisor would demand sex, and then grant the employee's requests for time off immediately after she had sex with him. (*Id*. at 513-514.)

On the other hand, in *Holly D. v. California Institute of Technology* (9th Cir. 2003) 339 F.3d 1158, the Ninth Circuit held that, even though the supervisor made sexual comments to the employee and had a lengthy affair with her, there was no evidence that would have caused a reasonable person to believe that the requests for sex were connected to a term of employment. (*Id*. at 1175-1176.)

Here, the undisputed facts show that neither Koch nor Basgall ever expressly or impliedly conditioned a term of employment on acceptance of a supervisor's unwelcome sexual advances. Plaintiff cites to several instances where Koch allegedly engaged in appropriate behavior with her. However, none of these incidents involved any express or implied request to have sex, nor was there any evidence that Koch's behavior was in any way connected with plaintiff's work benefits or change in employment status.

In one incident, Koch offered to let her put her pants in the dryer at his house after they got wet as the result of a prank played by another officer. (Defendant's UMF No.'s 25-26.) However, while the offer made plaintiff uncomfortable, Koch did not touch her or say anything of a sexual nature. (UMF No. 28.) There apparently was no express or implied discussion of plaintiff's job or benefits during the incident. (UMF No.'s 25-28.) Plaintiff never complained to anyone about Koch's behavior in this incident during her employment. (UMF No. 28.) Plaintiff claims that there is a dispute about whether she made a complaint about the incident, but cites only to the complaint to the City and the DFEH that she made after she was terminated, which was over a year after the incident. (Plaintiff's Response to Separate Statement, UMF No. 28.) Therefore, the incident does not support a quid pro quo harassment claim.

Plaintiff also complains that she used to have lunch or coffee with Koch on many occasions, and that sometimes he made comments about her personal life that made her uncomfortable, such as telling her not to date or get

married. (UMF No. 30, see also Exhibit Q to Kitabayashi decl., Carter depo., Vol. I, pp. 136:7 – 139:17.) However, he never touched her or made any other inappropriate comments. (*Ibid.*) There was nothing that Koch said or did that indicated that he would react unfavorably if she refused to have lunch or coffee with him. (UMF No. 31.)

On the other hand, plaintiff believed that Koch would be upset if she declined his offers, and this might cause her to suffer adverse consequences at work. (Carter decl., ¶¶ 3, 6, 8.) However, plaintiff's subjective belief that Koch might react unfavorably, unsupported by any objective evidence that he was conditioning job benefits or status on going to lunch or coffee with him, is not enough to raise a triable issue of fact as to whether his conduct constituted quid pro quo harassment. (*Holly D., supra*, at 1175.)

At one point, plaintiff complimented Koch on his cooking and her offered to give her cooking lessons. (UMF No. 32.) However, he did not touch her or make any other comments, although the incident did make plaintiff uncomfortable. (*Ibid.*) Again, this incident does not support a quid pro quo harassment claim, since there was no express or implied request for sex, and no objective evidence that Koch was conditioning employment status or benefits on plaintiff's acceptance of his offer.

Koch also invited plaintiff to dinner at his house in June of 2009, and she accepted. (UMF No. 33.) Plaintiff believed that Koch's family would be there, but in fact it was just Koch and plaintiff. (Carter depo., 151:5 – 153:5.) Koch made some comments about his wife that made plaintiff uncomfortable, and she was uncomfortable being alone with him at his house. (*Id.* at 154:3-11.) He also made comments that plaintiff should not date or get married, that she should enjoy her bachelor time, and that he couldn't stand that he has to share his house with his wife. (*Id.* at 154:14-18.) He did not make any other comments that made her uncomfortable. (*Id.* at 154:21-23.) Koch never said anything sexual in nature to plaintiff during the dinner. (*Id.* at 161:24 – 162:3.)

Again, this incident does not support the quid pro quo claim. Plaintiff admits that Koch never requested sex from her, or even mentioned sex. He never touched her or did anything that was sexual in nature. While he made some comments about her personal life that made her feel uncomfortable, as well as some comments about his own marriage, there was nothing that indicated that he was trying to have sex with her. Nor did he make any comments or do anything that suggested that she should have sex with him to obtain job benefits or keep her job. Therefore, the dinner incident does not show any quid pro quo harassment.

Koch also invited plaintiff to his son's baseball game during work hours, and she went to the game for a few innings before leaving. (UMF No. 34.) While the incident made her uncomfortable, there was nothing sexual about the invitation. (*Ibid.*) Koch never touched her, said anything of a sexual nature, or threatened her or her job if she didn't do something that he wanted her to do of

a sexual nature. (Carter dep., Vol. I, p. 162:14 – 163:2.) Therefore, this incident also does not show any quid pro quo harassment.

In May of 2009, Koch invited plaintiff to his house to play video games. (UMF No. 36.) Plaintiff was under the impression that other officers would also be present, but no one else was there. (Carter depo., Vol. I, p. 167:7-16.) This made plaintiff uncomfortable, but Koch did not say anything that made her uncomfortable. (*Id*. at p. 167:22 - 168:5.) Plaintiff checked with the other officers who had supposedly been invited, and none of them had been invited. (*Id*. at p. 168:6-13.) Plaintiff left after about 20 minutes. (*Id*. at p. 167:7-25.)

Again, this incident does not support a claim for quid pro quo harassment because there was no explicit or implicit discussion of sex or request for sex, and Koch never did or said anything that would suggest that he was conditioning plaintiff's employment benefits or continued employment on her acceptance of his sexual demands.

Koch also invited plaintiff over to his house on approximately three occasions to eat leftovers. (UMF No. 37.) Other officers were present during these incidents. (*Ibid*.) Plaintiff admits that Koch did not do or say anything during these incidents that made her uncomfortable. (*Ibid*.) Koch never touched her inappropriately during these incidents. (Carter depo., Vol. I , p. 173:5-7.) Therefore, these incidents do not support a quid pro quo harassment cause of action.

In another incident in June of 2009, plaintiff had injured her back and Koch came to the women's locker room to discuss the situation with her. (UMF No. 38.) Koch then took her to the hospital, then back to the station, and then to her home. (*Ibid*.) he offered to help her up the stairs to her residence and offered to bring her food, but she declined both offers. (*Ibid*.) Koch never said anything of a sexual nature during the incident, nor did he touch her inappropriately. (UMF No. 39.) Koch never retaliated against her for refusing his assistance and his offer to provide her with food. (*Ibid*.) Therefore, this incident does not provide any support for the quid pro quo harassment claim.

In September of 2009, Koch asked plaintiff to watch his house while he was on vacation. (UMF No. 42.) Plaintiff agreed. (*Ibid*.) As he was showing her around the house, he showed her the bed and said "If you stay, you can sleep here." (*Ibid*.) He also showed her the bathroom and said, "If you want to take a bubble bath, you can relax here. I put the bottles of bubbles out for you." (*Ibid*.) Koch's made his comments in a "flirtatious tone", and this made plaintiff uncomfortable. (Carter depo., Vol. II, p. 260:6-11.) However, Koch never touched her inappropriately, or implied that she was supposed to have sexual relations with him, or that she was supposed to get in bed or take a bath with him. (UMF No. 43.)

While this incident may have skirted the line regarding inappropriate behavior between a male supervisor and a female employee, the undisputed

facts show that Koch never made any sexual offers or requests of plaintiff, or even implied that she should have sex with him during the incident. Nor did Koch do or say anything to expressly or impliedly condition plaintiff's job status or benefits on having sex with him. Therefore, the incident does not support a quid pro quo harassment claim.

In late 2009, Koch invited plaintiff to his house for dinner. (UMF No. 44.) Koch said that his family would be there, so plaintiff accepted the invitation. (Carter depo., Vol. II, p. 264:15-18.) Koch again made statements that plaintiff should not get married, that she should not date, that she should enjoy single life, and that it is much easier than being in a relationship and that she would have freedom. (*Id*. at p. 270:2-5.) Plaintiff felt uncomfortable with the conversation, because Koch talked about his personal life and advised her to stay single. (*Id*. at p. 270:9-14.) However, she did not tell him that the conversation made her uncomfortable or ask him to stop. (*Id*. at p. 270:15-25.) He never made any comments of a sexual nature or touched her inappropriately. (*Id*. at p. 271:19-23.) His comments that she should not date other people did make plaintiff feel like he wanted her to be available so that he might at some point be in a relationship with her. (*Id*. at pp. 271:24 – 272:11.) However, he never made any express statements to that effect. (*Id*. at 272:12-14.)

There was no conversation during the dinner itself that made plaintiff uncomfortable, and Koch did not touch plaintiff inappropriately. (*Id*. at pp. 272:20 – 273:5.) Koch also asked plaintiff to stay and watch a movie with him after dinner, but she felt uncomfortable and declined. (*Id*. at pp. 273:18 - 274:5.)

Again, this incident does not support a claim for quid pro quo harassment. Plaintiff has not pointed to any statements or conduct by Koch that were sexual in nature, nor has she shown that Koch ever expressly or impliedly asked her for sex in exchange for keeping her job, or obtaining any job benefits. While Koch's invitation to have dinner with him and his personal comments to her may have been inappropriate, there is nothing that would tend to show that he was demanding or even implying that she needed to have sex with him as part of her conditions of employment. Therefore, this incident does not show any type of quid pro quo harassment by Koch.

Plaintiff has not pointed to any other incidents between herself and Koch that would tend to support a quid pro quo harassment cause of action against him. Therefore, the court intends to grant summary adjudication of the quid pro quo claim as to Koch.

Also, with regard to the quid pro quo claim against Basgall, plaintiff admits that there are no quid pro allegations against Basgall in the second amended complaint. (Plaintiff's response to UMF No. 58.) Therefore, apparently plaintiff does intend to pursue the first cause of action as to Basgall. However, plaintiff alleges in her opposition that Basgall told her that she should take her supervisors to dinner more often, and stop seeing Officer Bagley if she wanted to receive better performance reviews. (Carter decl., ¶ 25.) These statements do not

support a quid pro quo harassment cause of action, since Bagley's statements do not expressly or impliedly suggest that plaintiff needed to submit to her supervisor's sexual advances in order to improve her performance reviews. To the extent that Bagley might have been implying that plaintiff needed to spend more time with Koch, there is no evidence that Koch ever demanded or implied that she should submit to any sexual advances, or that her performance reviews were tied to having sex with him. Nor has plaintiff pointed to any evidence that might suggest that Bagley himself made any sexual advances toward her, or that her performance reviews or other employment conditions were dependent on having sex with him.

Furthermore, even after obtaining a continuance to conduct additional discovery, plaintiff has still failed to cite any evidence that would tend to show that Basgall or Koch ever demanded sex from her in return for better reviews, or any other condition of employment. Plaintiff only points to some additional evidence that she claims shows a pretext to terminate her. However, this evidence is not relevant to the issue of whether Koch or Basgall engaged in quid pro quo harassment, and thus does not raise a triable issue as to the first cause of action. Therefore, the court grants summary adjudication of the quid pro quo harassment claim.

Second Cause of Action – Hostile Work Environment Sexual Harassment: "For [hostile work environment] sexual harassment to be actionable, it must be sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'" (*Meritor Savings Bank v. Vinson* (1986) 477 U.S. 57, 67.)

"Whether the sexual conduct complained of is sufficiently pervasive to create a hostile or offensive work environment must be determined from the totality of the circumstances. [Citation.] The plaintiff must prove that the defendant's conduct would have interfered with a reasonable employee's work performance and would have seriously affected the psychological well-being of a reasonable employee and that she was actually offended. [Citation.]" (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 609-10.)

"The factors that can be considered in evaluating the totality of the circumstances are: (1) the nature of the unwelcome sexual acts or works (generally, physical touching is more offensive than unwelcome verbal abuse); (2) the frequency of the offensive encounters; (3) the total number of days over which all of the offensive conduct occurs; and (4) the context in which the sexually harassing conduct occurred. [Citation.]" (*Id.* at 610.)

Also, "In determining what constitutes 'sufficiently pervasive' harassment, the courts have held that acts of harassment cannot be occasional, isolated, sporadic, or trivial, rather the plaintiff must show a concerted pattern of harassment of a repeated, routine or a generalized nature. [Citation.]" (*Ibid.*)

Furthermore, "To be actionable, 'a sexually objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so.' [Citations.] That means a plaintiff who subjectively perceives the workplace as hostile or abusive will not prevail under the FEHA, if a reasonable person in the plaintiff's position, considering all the circumstances, would not share the same perception. Likewise, a plaintiff who does not perceive the workplace as hostile or abusive will not prevail, even if it objectively is so." (*Lyle v. Warner Bros. Television Productions* (2006) 38 Cal.4th 264, 284.)

Here, the plaintiff apparently relies on the same incidents cited above to support her hostile work environment claim. Plaintiff also contends that she was subjected to negative performance reviews, extra scrutiny, and eventually she was terminated after she started dating Officer Bagley. (UMF No.'s 48-50.) However, plaintiff has not pointed to a single incident where Koch or Basgall made any sexual comments to her, touched her, propositioned her for sex, displayed sexual material where she could see it, or did anything overtly sexual in her presence. Thus, a reasonable person in plaintiff's position could not have perceived the workplace to be sexually harassing and hostile, even assuming that plaintiff was subjectively offended by Koch's or Basgall's conduct. At most, the incidents cited by plaintiff are isolated, trivial and sporadic, not the kind of severe or pervasive conduct that is required to show a hostile work environment. (*Fisher, supra*, at 610.)

Plaintiff contends that summary judgment is rarely appropriate in hostile work environment cases, since the question of whether the conduct is sufficiently severe or pervasive to create a hostile work environment is inherently factual. (*Davis v. Team Electric Co.* (9th Cir. 2008) 520 F.3d 1080, 1096.) However, the court in *Davis* merely held that, "**[i]n close cases such as this one**, where the severity of frequent abuse is questionable, it is more appropriate to leave the assessment to the fact-finder than for the court to decide the case on summary judgment." (*Id.* at 1096, emphasis added.)

Plaintiff has not pointed to any overt comments or conduct by either Koch or Basgall that would support a finding that there was a hostile work environment. Even assuming that some of Koch's conduct was inappropriate, he never touched plaintiff, propositioned her for sex, exposed her to sexual materials, made sexual jokes, or otherwise engaged in the kind of behavior that would support a hostile work environment claim. Likewise, Basgall did not make any sexual comments or engaged in any sexual conduct around plaintiff.

Even after being given a continuance to conduct further discovery, plaintiff has not been able to point to any evidence of hostile work environment harassment. Plaintiff only claims that there is evidence that she was terminated for pretextual reasons, which is not relevant to the issue of whether the workplace was hostile before her termination. Therefore, the court grants summary adjudication of the hostile work environment claim.

Third Cause of Action – Retaliation: "A retaliation claim may be proved in two different ways. [¶] First, a plaintiff may prove retaliation by circumstantial evidence. In these cases, the plaintiff is required to first establish a prima facie case of retaliation. Once established, the defendant must counter with evidence of a legitimate, nonretaliatory explanation for its acts. If defendant meets this requirement, the plaintiff must then show the explanation is merely a pretext for retaliation. [Citations.] [¶] Second, retaliation may be proved by direct evidence. 'Where a plaintiff offers direct evidence of discrimination that is believed by the trier of fact, the defendant can avoid liability only by proving the plaintiff would have been subjected to the same employment decision without reference to the unlawful factor.' [Citation.]" (*Mokler v. County of Orange* (2007) 157 Cal.App.4th 121, 138.)

Here, plaintiff relies on Govt. Code § 12940(h), which prohibits retaliation by an employer against an employee where the employee has "opposed any practices forbidden under [FEHA]or because the person has filed a complaint, testified, or assisted in any proceeding under [FEHA]."

Plaintiff claims that she only started to receive negative performance reviews after she rejected Koch's advances and started dating Officer Bagley. (Carter decl., ¶¶ 17-25.) She also informed Basgall of her suspicions that she was being treated differently based on improper motives. (*Id.* at ¶ 25.) Basgall told plaintiff that she needed to spend more time with her supervisors and stop seeing Bagley if she wanted better performance reviews. (*Ibid.*) When plaintiff failed to follow these suggestions, she was terminated. (*Id.* at ¶ 29.) Therefore, it appears that the plaintiff contends that she was opposing the forbidden practice of quid pro quo sexual harassment, since she refused Koch's alleged sexual advances, as well as refusing Basgall's advice to see her supervisors more and spend less time with Officer Bagley.

The foregoing is sufficient to withstand the defendant's motion for summary adjudication, which is denied as to this cause of action.

Fourth Cause of Action – Wrongful Termination in Violation of Public Policy: In *Miklosy v. Regents of the University of California* (2008) 44 Cal.4th 876, the California Supreme Court held that plaintiffs cannot state a common law *Tameny* claim against a public entity, because Government Code § 815 bars all common law claims against public entities. (*Id.* at 899-900.) Nor can plaintiff sue an individual supervisor for wrongful discharge, since such claims will only lie against the employer. (*Id.* at 900.) Therefore, plaintiff's fourth cause of action is barred as a matter of law.

Plaintiff's opposition does not even address the fourth cause of action, so apparently plaintiff concedes that this cause of action is barred. Consequently, the court grants summary adjudication of the fourth cause of action.

Fifth Cause of Action – Intentional Infliction of Emotional Distress: "The elements of a cause of action for intentional infliction of emotional distress are:

'(1) outrageous conduct by the defendant, (2) intention to cause or reckless disregard of the probability of causing emotional distress, (3) severe emotional suffering and (4) actual and proximate causation of the emotional distress.' [Citations.]" (Wong v. Tai Jing (2010) 189 Cal.App.4th 1354, 1376.)

"Although 'emotional distress may consist of any highly unpleasant mental reaction such as fright, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment or worry' [citation], to make out a claim, the plaintiff must prove that emotional distress was severe and not trivial or transient. [Citation.]" (*Ibid.*)

"The California Supreme Court has set a "high bar" for what can constitute severe distress. (*Hughes v. Pair* (2009) 46 Cal.4th 1035, 1051, 95 Cal.Rptr.3d 636, 209 P.3d 963 (*Hughes*).) 'Severe emotional distress means "emotional distress of such substantial quality or enduring quality that no reasonable [person] in civilized society should be expected to endure it." [Citations.]' [Citations.] Moreover, ' "[i]t is for *the court* to determine whether on the evidence severe emotional distress can be found; it is for the jury to determine whether, on the evidence, it has in fact existed." [Citation.]' [Citation.]" (*Ibid*, emphasis in original.)

For example, in *Hughes*, the California Supreme Court held that plaintiff's allegations that "she has suffered discomfort, worry, anxiety, upset stomach, concern, and agitation" as a result of the defendant's conduct "do not comprise ' " 'emotional distress of such substantial quality or enduring quality that no reasonable [person] in civilized society should be expected to endure it.' " ' [Citation.]" (*Hughes, supra,* at p. 1051.) The court also held that defendant's alleged sexually explicit comments to plaintiff, in which he essentially demanded sex from her in exchange for access to her trust funds, were not so outrageous as to exceed all bounds of that usually tolerated in a civilized community. (*Ibid.*)

Likewise, here the undisputed facts show that plaintiff will be unable to prove that defendants acted in an outrageous manner that exceeds all bounds of that usually tolerated in a civilized community, or that plaintiff suffered the type of severe emotional distress that is necessary to support an IIED claim. As discussed above, Koch never touched plaintiff inappropriately, never made any explicitly sexual comments to her, never demanded sex from her, and never implied that she needed to have sex with him to keep her job or get better evaluations. Likewise, Basgall never made any sexual comments or overtures toward plaintiff. At most, Basgall stated that plaintiff should spend more time with her supervisors, but not Koch specifically, and that she should spend less time with Bagley. (Carter decl., ¶ 25.) These types of comments are far from the sorts of explicit sexual overtures that the Supreme Court found to be insufficient to support an IIED claim in Hughes, and certainly do not show any extreme or outrageous behavior by either Koch or Basgall.

Also, plaintiff testified in her deposition that, since her termination, she has suffered from trouble sleeping, nightmares one to three times a week, panic and anxiety attacks twice a week, loss of appetite, embarrassment, shame, anxiety

and stress. (UMF No.'s 70-75.) However, plaintiff has not seen any licensed medical or mental health professionals for these problems, and she has not taken any medications for them. (*Ibid.*) Her weight has gone from 140 pounds when she was in the academy, to 160 pounds when she was a probationary officer, to 150 pounds currently. (UMF No. 73.)

These types of problems appear to be similar to the kinds of problems suffered by the plaintiff in *Hughes*, which the Supreme Court found to be insufficient to show "severe emotional distress." (*Hughes, supra*, at 1051.) The plaintiff does not dispute any of these facts, and she has not submitted any additional evidence that would raise a triable issue as to the severity of her emotional distress, or that would tend to show that defendants' conduct was extreme or outrageous. Therefore, the court grants summary adjudication of the fifth cause of action for intentional infliction of emotional distress.

Sixth Cause of Action – Discrimination and Association: Defendants first argue that the plaintiff's discrimination claim is barred because she did not raise it in her DFEH complaint. Since exhaustion of administrative remedies is a jurisdictional prerequisite, failure to exhaust administrative remedies with regard to a particular cause of action bars the plaintiff from asserting that claim. (*Okoli v. Lockheed Technical Operations Co.* (1995) 36 Cal.App.4th 1607, 1613, 1617.)

However, the court has already rejected this argument on demurrer, finding that plaintiff had sufficiently exhausted her administrative remedies by stating in her pre-complaint questionnaire that she had been discriminated against because of her relationship with Officer Bagley, an African American. In *Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, the court found that it was proper to consider a plaintiff's pre-complaint questionnaire to the DFEH in determining whether the plaintiff exhausted his administrative remedies. (*Id.* at 265-269.) The court rejected defendants' argument that the court should consider only the contents of the DFEH complaint itself without any regard for the other evidence before the DFEH regarding discrimination. (*Id.* at 266-268.)

"[W]hat is submitted to the DFEH must not only be construed liberally in favor of plaintiff, it must be construed in light of what might be uncovered by a reasonable investigation." (*Id.* at 268.) The court found that the body of evidence before the DFEH, including the letters and pre-complaint questionnaires, showed that there were triable issues as to whether plaintiff exhausted his administrative remedies. (*Id.* at 268-269.)

Because the court has already found that the pre-complaint questionnaire adequately raised the issue of discrimination based on association with an African American colleague, the court does not intend to grant summary adjudication based on the alleged failure to exhaust administrative remedies as to the discrimination claim.

Next, with regard to the merits of the plaintiff's claim, it is possible for a person who is not a member of a protected class to state a claim for

discrimination based on her association with, or advocacy on behalf of, protected employees. (*Thompson v. City of Monrovia* (2010) 186 Cal.App.4th 860, 876-878.)

The elements of a discrimination claim are (1) plaintiff was a member of a protected class (or associated with a protected class member); (2) plaintiff was subjected to unwelcome racial harassment; (3) the harassment was based on race; (4) the harassment unreasonably interfered with his or her work performance by creating an intimidating, hostile, or offensive work environment; and (5) the employer is liable for the harassment. (*Id.* at 876.)

"A plaintiff, though not within a protected class, may satisfy the first prong of this test based on her association with or advocacy on behalf of protected employees. By introducing evidence that she was subjected to unwelcome racial comments as a result of her association with or advocacy for protected employees, a plaintiff satisfies the second and third prongs." (*Barrett v. Whirlpool Corp.* (6th Cir. 2009) 556 F.3d 502, 515.)

In the context of an association discrimination claim, plaintiff can establish the fourth prong by proving that the defendant's conduct would have interfered with a reasonable employee's work performance and would have seriously affected the psychological well-being of a reasonable employee. (*Thompson, supra,* at 877.)

"Harassment, which may be verbal, physical, or visual and 'communicates an offensive message to the harassed employee' [citation] 'cannot be occasional, isolated, sporadic, or trivial[;] rather the plaintiff must show a concerted pattern of harassment of a repeated, routine or a generalized nature.' [Citation.] Whether the harassment is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive environment 'must be assessed from the "perspective of a reasonable person belonging to the racial or ethnic group of the plaintiff."' [Citation.]" (*Ibid.*)

"To assess the fourth prong of an asserted prima facie case, we must examine the totality of the circumstances. [Citation.] In doing so, we consider 'the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.' [Citation.] '[C]onduct must be extreme to amount to a change in the terms and conditions of employment....' [Citation.] '[S]imple teasing, ... offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the terms and conditions of employment.' [Citation.] We do not limit our analysis to the narrow set of incidents directed at the plaintiff or occurring in the plaintiff's presence, [citation] but comments or conduct of which a plaintiff had no knowledge cannot be said to have made her work environment hostile. [Citations.]" (*Barrett v. Whirlpool Corp., supra,* at 515.)

In the present case, there is no evidence of racial slurs or comments made by Koch or Basgall directed toward plaintiff or Officer Bagley. However, plaintiff has presented evidence that Koch began to give her more negative performance reviews after she started dating Bagley, and Basgall allegedly indicated to plaintiff that her performance reviews would improve if she stopped seeing Bagley. (UMF No.'s 8-13, Carter decl., ¶¶ 17-25.) Yet plaintiff admitted in her deposition that she had no direct evidence that the decision to terminate her was connected with her relationship with Bagley. (Carter depo., Vol. III, pp. 362:16 – 363:8.) Plaintiff also admitted that she does not know whether Koch had any role in her termination, whether he requested her termination, or whether he discussed her relationship with Bagley with any supervisor or administrator. (*Id*. at p. 403:10-22.) She also admitted that Basgall told her in July or August of 2010 that he did not care who she dated as long as it did not impact her work. (UMF No. 11.) In addition, plaintiff admits that Koch never told her not to date or marry African American person, or any other minority. (UMF No. 13.) Koch also never did or said anything that made plaintiff believe that he was biased against African Americans or other minorities. (*Ibid*.)

Plaintiff disputes fact 13, claiming that Koch's demeanor changed toward her after she started dating Bagley in a way that it never did when she was dating other non-African American officers. (Carter decl., ¶ 18.)

Plaintiff further states that on September 15th, 2010, Basgall indicated her performance reviews would improve if she stopped dating Bagley, or spending so much time with him. (*Id*. at ¶ 25.) Specifically, plaintiff met with Basgall on September 15th, 2010 to discuss her performance. (*Ibid*.) Basgall told her that Koch would be giving plaintiff her evaluation within the month and that it was not good. (*Ibid*.) When plaintiff asked what she was still doing wrong, Basgall told her that she was not a team player and was abrasive with the public. (*Ibid*.) However, when asked to give examples of what she had done wrong, Basgall would not or could not provide any. (*Ibid*.) He said Koch would explain when he gave her his evaluation. (*Ibid*.)

Plaintiff then asked Basgall for any suggestions as to how she could change the perception that he and Koch said others had of her, and he told her, among other suggestions, to stop assisting Officer Bagley on calls, and to tell Officer Bagley to stop assisting her on calls. (*Ibid*.) He said that plaintiff's partners perceived that Bagley and she were close. (*Ibid*.) He told plaintiff to stop sitting by Officer Bagley in training sessions, and to tell him not to sit by her. (*Ibid*.) Plaintiff told Basgall that she'd never had any problems in the department before she started associating with Officer Bagley, and offered to switch to weekday grave shifts so they would be on different shifts. (*Ibid*.) Basgall told her that he didn't want to do that because it would make her look like a problem child. (*Ibid*.) Finally, plaintiff asked Basgall whether if she stopped dating Officer Bagley her problems would go away. (*Ibid*.) He nodded his head "Yes." (*Ibid*.) Plaintiff took this to mean that, if she stopped dating an African American, her problems with him and Koch would stop. (*Ibid*.) Plaintiff was terminated less than two months later, in on November 2nd, 2010. (*Id*. at ¶ 29.)

This conflicting evidence is sufficient to preclude summary adjudication of this cause of action, which is denied.

Seventh Cause of Action – Failure to Prevent Harassment, Discrimination, or Retaliation:

For the reasons stated above, summary adjudication of this cause of action is also denied.

Objections: Defendant has raised several objections to plaintiff's evidence, both in the reply and the supplemental reply.

Reply Objections to Carter Declaration: The court overrules all of the objections to plaintiff's declaration in opposition to the motion for summary judgment.

Reply Objections to Manock Declaration: The court overrules all of the objections to Charles Manock's declaration, except the objection to paragraph 7, which will be sustained for lack of foundation and hearsay.

Reply Objections to Plaintiff's Evidence Cited in Opposition Brief: The court overrules all of the objections to the evidence cited in plaintiff's opposition. It is improper to object to a brief, as opposed to the actual evidence submitted by the party.

Supplemental Reply Objections to Supplemental Carter Decl.: The court overrules all of the objections to the supplemental declaration of Carter.

Supplemental Reply Objections to Supplemental Manock Declaration: The court sustains all of the objections to the supplemental declaration of Manock, as the court's prior order granting a continuance of the motion was for the purpose of allowing plaintiff to discover new evidence, not to present evidence that plaintiff already had, but had not submitted with the opposition.

Supplemental Reply Objections to Evidence Cited in Supplemental Opposition Brief: The court overrules all of the objections to the evidence cited in the supplemental opposition brief. It is not proper to object to a brief, as opposed to the evidence. Also, it is impossible to tell from the way the objections are drafted to which evidence defendants are objecting.

Issued By: _____ **on** 6/10/13.
(Judge) (Date)

SUPERIOR COURT OF CALIFORNIA • COUNTY OF FRESNO Civil Department, Central Division 1130 "O" Street Fresno, CA 93724 (559)	*FOR COURT USE ONLY*
TITLE OF CASE: **Audra Carter vs. City of Clovis Police Dept.**	
CLERK'S CERTIFICATE OF MAILING	CASE NUMBER: **11CECG03941 MWS**

Name and address of person served:

Jenell Van Bindsbergen
Lozano Smith
7404 N. Spalding
Fresno, CA 93720

CLERK'S CERTIFICATE OF MAILING

I certify that I am not a party to this cause and that a true copy of the June 10, 2013 Minute Order was mailed first class, postage fully prepaid, in a sealed envelope addressed as shown below, and that the notice was mailed at, California, on:

Date: **June 10, 2013** Clerk, by_____, Deputy

Jenell Van Bindsbergen, Lozano Smith, 515 South Figueroa St, Los Angeles CA 90071
Louis D. Torch, Baker, Manock & Jensen, PC, 5260 N. Palm Ave, Fresno CA 93704